Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GUARDIAN NORA DUTKA, AS GUARDIAN FOR THE ESTATE OF T.M., A MINOR, and THE ESTATE OF J.M., A MINOR
Petitioner

v.

AIG LIFE INSURANCE COMPANY
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTION PRESENTED

Whether, absent an express discretion clause in an ERISA governed insurance plan, the factual determinations of the administrator are subject to *de novo* review by the courts.

This Court, in 1988, granted certiorari to Firestone Tire & Rubber Company in order to resolve a conflict among the circuits regarding the standard of review applicable to the benefits determinations of benefit plan administrators. The Court determined, in *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989) that, absent an express reservation of discretion clause in the policy, administrator determinations in ERISA covered plans are to be reviewed by the courts under a *de novo* standard of review. While the issue in that case was the standard to apply to a plan term interpretation, almost immediately courts started struggling with whether to apply the *Firestone* Court's reasoning to an administrator's *factual* determinations as well.

Today, all but one of the Circuit Courts that have considered the issue interpret *Firestone* to apply to factual determinations as well as plan interpretations of the administrator. This Court is being asked to address this conflict between The Fifth Circuit Court of Appeals and the other eleven Circuit Courts with jurisdiction.

PARTIES TO THE PROCEEDINGS

The parties below are included in the caption. They are:

Petitioner:	Nora Dutka as Guardian of the Estate of T.M., a minor, and the Estate of J.M., a minor.
Respondent:	AIG Life Insurance Company.

CORPORATE DISCLOSURE STATEMENT

Petitioner Nora Dutka is an individual who does not fall within the scope of Supreme Court Rule 29.6's disclosure statement.

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OPINION BELOW

In a published opinion (05cae 08-20515) of the Fifth Circuit Court of Appeals filed on June 24, 2009, the court affirmed the decision of the District Court for the Southern District of Texas, affirming application of a deferential standard of review and upholding an insurance administrator's denial of benefits.

A further description of the opinions below is included in the Statement of the Case. The entire District Court's and the Fifth Circuit Court of Appeals' opinions appear in the appendix.

STATEMENT OF JURISDICTION

The District Court's jurisdiction was invoked under the Employee Retirement Income Security Act, 29 U.S.C. Sec.1132(a)(1)(B). That court denied Petitioners Motion for Summary Judgment, granted Defendant's Cross-Motion and dismissed the case with prejudice. The United States Court of Appeals for the Fifth Circuit affirmed.

Per 28 U.S.C. Sec.1254(1), cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATUTORY PROVISIONS INVOLVED

Title 29 United States Code, section 1001 *et seq.*, The Employee Retirement Income Security Act of 1974.

STATEMENT OF THE CASE

This case is governed by the Employment Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq*. The underlying lawsuit is authorized by section 1132(a)(1)(B) of the Act.

The insured decedent in this case, an employee of Continental Airlines, voluntarily enrolled in an accident insurance plan for employees of Continental Airlines. The plan was insured and administered by AIG Life Insurance Company (USCA5 565) and designated his two minor children as the beneficiaries of the policy. He chose and paid the premium for $500,000 worth of accident insurance from AIG Life Insurance Company.

At the time of the accident, the decedent was flying low and slow to scout deer hunting sites. There was no evidence of any erratic behavior before or during the flight and no witnesses to the accident. There was no evidence that the decedent had ever flown or even driven a car under the influence of any substance. There were no drugs or paraphernalia found anywhere at the scene or on the body of the decedent or anywhere else. As the district court noted in its judgment, there was no proof that indicated the decedent was under the influence or that it contributed to this accident. (App. 15)

There was no cocaine or alcohol in the blood of decedent although a just reportable trace of metabolized cocaine in the urine. There was a half a therapeutic dose of Darvon (Propoxyphene) in the blood . Neither the FAA nor the NTSB attributed

the accident to drugs. AIG denied the claim, and its ERISA Appeals Committee upheld the denial citing a policy exclusion. The exclusion stated: *"[t]his policy does not cover any loss caused in whole or in part by, or resulting in whole or in part from, the following:...5. the Insured being under the influence of drugs or intoxicants, unless taken under the advice of a physician;..."* (USCA5 110). AIG asserted that Mr. Macsai was under the influence at the time of the accident and that no benefits were payable. *Id.*

The insurance policy (USCA5 130) and the Master Application for Group Accident Insurance (USCA5 144), both written by AIG, who was both the insurer and administrator, did not contain an express clause giving AIG discretion to determine eligibility for benefits. The policy contained an integration clause stating that it, the Master Application for Group Accident Insurance and the attached riders were the entire contract between the parties. (USCA5 137).

A document purported to be the Summary Plan Description (SPD), written by Continental Airlines (not AIG) did contain a discretion clause. (USCA5 713). This SPD didn't appear until after Petitioner's Motion for Summary Judgment but prior to Respondent's Cross Motion for Summary Judgment. In spite of being challenged to do so in the District Court, Respondent never proved the authenticity or applicability of the SPD. The SPD said that in case of conflict between it and the plan documents, the plan documents prevail. (USCA5 555). The District Court did not rule on whether the SPD granted any discretion to the administrator.

The District Court found "no proof" but applied a deferential standard of review.

Originally, Ms. Dutka filed her complaint in the United States District Court for the Southern District of Texas (case number 4:07-cv-04316) to challenge the denial of benefits, arguing that a *de novo* standard of review should apply.

The District Court, however, applied a deferential standard of review (arbitrary and capricious) and granted summary judgment to AIG based upon its conclusion that, although there was *no proof* that Mr. Macsai was under the influence or that it caused the accident, the denial of benefits was not unreasonable. (App. 15). The judge cited the Fifth Circuit case of *Pierre v. Connecticut General Life Insurance Company*, 932 F.2d 1552 (5th Cir. 1991) and its progeny (*Meditrust Fin. Servs. Co. v. Sterling Chems.*, 168 F.3d 211 (5th Cir. 1999) as his rational for granting deference to the administrator's factual determination. (App. 13-14). The Judge mentioned but did not rule on Petitioner's arguments against the efficacy of the SPD, again, written by Continental Airlines, to delegate discretion to AIG to determine eligibility for benefits. Nor did the court rule on Petitioner's arguments that AIG did not apply a reasonable interpretation of the term "under the influence."

The Fifth Circuit affirmed despite "weaknesses in the evidence."

On appeal, although the Fifth Circuit stated that there were "weaknesses in the evidence,"

(App.4), it nevertheless affirmed the lower court's judgment, determining that, under application of a arbitrary and capricious standard of review (again, *Pierre*, 932 F.2d 1552), "the plan administrator [AIG] did not abuse its discretion in finding that the crash was caused by the pilot's intoxication." (App. 4).

Therefore, both lower courts refused to rule on the Petitioner's arguments that the policy did not grant deference to AIG's determinations. The Fifth Circuit even called the arguments "inapposite." (App. 6, fn.4). Both courts, applying *Pierre*, instead granted AIG discretion (under the arbitrary and capricious standard of review) to determine factual matters regardless of whether any discretion had been expressly reserved. Both courts allowed their deference for the factual determinations of AIG alone to carry the day. Neither court considered the Petitioner's challenge to the plan interpretations of the administrator.

The Petitioner brings this application because she believes the automatic grant of deference to the administrator's factual determinations has caused the lower courts to decide the case contrary to the evidence and indeed contrary to the stated reservations of these very courts.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit is the only circuit that defers to the factual determinations of an administrator regardless of the absence of an express reservation of discretion in the plan. This Court should grant this petition in order to correct this inconsistency.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Supreme Court considered the standard of review regarding ERISA covered plans that is applicable to the benefits determinations of plan administrators. While limiting its review in that case to interpretations of plan terms, because that was the issue before the Court, the Court nevertheless analogized the standard of review to that of a trust trustee. The court plainly stated: "that a denial of benefits challenged under 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe terms of the plan." *Id.* at 115.

The Fifth Circuit, however, grants deferential review to the factual determinations of an administrator even in situations where there is no express reservation of discretion in the policy. *See Pierre v. Conn. Gen. Life Ins. Co.*, 932 F.2d 1552, 1562 (5th Cir.), cert. denied, 502 U.S. 973, 112 S. Ct. 453, 116 L. Ed. 2d 470 (1991), (*see also* Appendix 3 and App. 13, *the lower courts' opinions in this case stating the standard of review they applied*).

This automatic deferential standard affords the citizens within its jurisdiction less protections to themselves and their beneficiaries than that provided to the citizens of the rest of the country. In fact, it affords those citizens less protection against improper benefits denials than existed prior to the enactment of ERISA.

As Justices White and Blackmun noted in their dissent to the denial of certiorari to Mrs. Pierre in *Pierre v. Connecticut Gen. Life Ins. Co.*, 502 U.S. 973 (1991), there was already a split among the circuits regarding the standard of review of the factual determinations of an administrator. Eighteen years later, that split has largely been resolved. Today, only the Fifth Circuit applies an automatic deferential standard of review to the factual determination of an administrator.

Standard of Review of the other United States Federal Courts of Appeals.

The following survey of the Circuit Courts of Appeals illustrates that, overwhelmingly, courts apply a *de novo* standard of review, absent a discretion clause, to both the plan term interpretations and the factual determinations of a plan administrator.

First Circuit

1. Shortly after *Firestone* came out, the First Circuit put it to work. In *Bellino, et al. v. Schlumberger Technologies, Inc.*, 944 F.2d 26, 27-29 (1st Cir. 1991), the court affirmed the district court's

determination that the *de novo* standard of review applied (which was a disputed issue) and affirmed the courts' *de novo* review of both plan interpretations and the facts of the case.

2. In *Ordnorf v. Paul Revere Life Ins. Co.* 404 F.3d 510 (1st Cir. 2005), the First Circuit said that where there is no discretion clause, "*Firestone* makes it clear that in such situations of dispute over the meaning of plan language, no deference is given to the administrator's interpretation of the plan language." *At* 517. The court, in the same paragraph, also wrote: "[b]ut literally read, *Firestone's de novo* review language is broader, and also includes a conclusion to deny benefits based on a set of facts..." *Id.* The court went on to extensively re-examine the facts of the case, further affirming the district court's application of *de novo* review to the facts of the case and affirmed the lower court's judgment. *Id.* at 520-527.

Second Circuit

1. In *Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 250-251 (2nd Cir. 1999), the court determined that the language of the Supreme Court in *Firestone* required *de novo* review of both plan interpretations and factual determinations regardless of whether the precise issue of factual determinations was before the *Firestone* Court at that time. Like the Third, Fourth, and Seventh Circuits had, the Court said that the term "eligibility for benefits" in *Firestone* was distinct from "constru[ing] the terms of the plan." *Id.*

2. In 2003, the Second Circuit confirmed the rule that, absent a discretion clause, a court is to review, *de novo*, plan interpretations and factual determinations of the administrator. In *Muller v. First Unum Life Ins. Co.*, 341 F.3d 119, 124-125 (2nd Cir. 2003), the court remanded back to the district court specifically for it to make explicit findings of facts and conclusions of law.

Third Circuit

1. In *Luby v. Teamsters Health, Welfare, And Pension Trust Funds*, 944 F.2d 1176, 1183-1184 (3rd Cir. 1991), the court stated: "[w]e hold that an ERISA plan administrator's decision as to entitlement between beneficiary claimants based solely on factual determinations is to be reviewed *de novo*. We believe this is consistent with *Firestone* and its emphasis on the goals of ERISA: to protect the interests of plan members and their beneficiaries."

The Court discussed that the term "eligibility for benefits" in *Firestone* applied to factual issues. It also said that administrators are not to be afforded the automatic deference usually granted governmental agencies. *Id.*

2. The court reinforced *Luby* in *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 438 (3rd Cir. 1997), when it said that "*Firestone's de novo* standard of review applies to decisions based on plan administrators' factual determinations as well as decisions based on their interpretations of the terms of the plan." The court then went on to agree with

the Seventh Circuit (quoting *Petrilli v. Drechsel*, 910 F.2d 1441, 1446 (7th Cir. 1990)) when it said: "[p]lan administrators are not governmental agencies who are frequently granted deferential review because of their acknowledged expertise. Administrators may be laypersons, appointed under the plan, sometimes without any legal, accounting, or other training ...little knowledge of the rules of evidence or legal procedures to assist them in factfinding." *Mitchell*, 113 F.3d at 438.

Fourth Circuit

1. In *Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210, 1213-1214 (4th Cir. 1990), the Fourth Circuit, in citing *Firestone* (489 U.S at 115), specifically held that "the standard announced in *Firestone* applies both to interpretation of policy terms and to factual determinations necessary for the administrator to 'determine eligibility for benefits.'" To further clarify, the court next stated: "[c]ourts will review both sets of questions *de novo* unless the policy delegates discretionary authority to one of the parties." *Reinking*, at 1214. "For us to grant the plan administrator such discretion would unnecessarily undermine the protection of the employee afforded by the ERISA statute." *Id.*

2. Later in *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017 (4th Cir. 1993) (en banc), the court affirmed the district court's application of *de novo* review of the facts of the case. In fact, the biggest dispute in this case was not whether factual determinations are to be reviewed *de novo* but whether the court can also review, *de novo*, factual

evidence that was beyond that included in the original administrative record. *Quesinberry*, at 1019. The Circuit Court decided that the lower court properly considered, *de novo,* the factual evidence, even that beyond what was presented prior to the administrator's denial. *Id.* at 1026.

Sixth Circuit

1. Pages 821-825 of *Perez v. Aetna Life Ins. Co.*, 96 F.3d 813 (6th Cir. 1996), vacated for rehearing en banc, 106 F.3d 146 (6th Cir.1997), are a literal treatise on applying *de novo* review to both plan interpretations and factual determinations of an administrator where no discretion clause exists in the contract. In deeply analyzing the Fifth Circuit's rational in *Pierre*, the Sixth Circuit held: "[w]e reject the reasoning of *Pierre*. We join every other circuit that has either explicitly or implicitly addressed this question. *Bruch* [a.k.a. *Firestone*] does not distinguish between fact-finding and plan term interpretation." *Id.*, (*brackets added*). The court then cited *Firestone*, 489 U.S at 115, and added its own interpretation in brackets:

> "Consistent with established principles of trust law, we hold that a denial of benefits challenged under section 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits [fact finding] or to construe the terms of the plan [plan interpretation]."

Perez, at 825 (*brackets added by the court*). On rehearing en banc, the court did not re-visit the issue of deference to factual determinations absent a discretion clause because they determined that discretion had, in fact been reserved. *See Perez v. Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998).

2. However, in 1997, the court verified its prior *Perez* reasoning regarding the application of *de novo* review of factual determinations in *Rowan v. Unum Life Insu. Co. of America*, 119 F.3d 433 (6th Cir. 1997) when faced with a policy that did not contain a discretion clause. There the court reiterated "[w]e hold that factual determinations of plan administrators in actions brought under 29 U.S.C. sec.1132(a)(1)(B) are subject to *de novo* review." *Id.* at 435.

Seventh Circuit

1. The Seventh Circuit, in *Ramsey v. Hercules Inc. and Provident Life and Accident Ins. Co.*, 77 F.3d 199, 203-205 (7th Cir. 1996), after first determining that the policy at issue did not confer discretion upon the administrator, undertook its own detailed analysis of the case law regarding review of factual determinations of an administrator. The court said: '[u]nder general principles of trust law, courts do not alter the standard under which they review a trustee's decision based on the characterization of that decision as interpretive or factual." *Id.* at 203. The court was very clear in its interpretation that the Supreme Court in *Firestone* (489 U.S. at 113) rejected the argument for deferential standards of

review and said "the court's power to require the trustee to justify decisions has for centuries been an important part of the protection enjoyed by trust beneficiaries in Anglo-American law." *Ramsey*, 77 F.3d at 204.

The *Ramsey* court also discounted other points made in *Pierre*, stating that administrators of insurance policies are not to be given the deference given to administrative law judges, agencies, or federal district courts as they "neither enjoy the acknowledged expertise...nor are they unbiased fact finders...". *Ramsey* at 205.

2. Once determining that *de novo* review was proper in *Patton v. MFS/Sun Life Financial Distributors, Inc.*, 480 F.3d 478, 486 (7th Cir. 2007), the court went on to actually reverse and remand for the lower court to hear factual evidence even beyond that in the administrative record. *Id.* at 493.

This tracks a modern trend whereby courts are not only reviewing, *de novo*, the facts in the administrative record, but even evidence offered after the final denial in order to conduct a thorough *de novo* review of the case.

Eighth Circuit

1. In 2001, the Eighth Circuit wrote "We hold that, absent language in the plan granting discretionary authority to the administrator to determine eligibility for benefits or to construe terms of the plan, fact-based determinations should receive *de novo* review." *Riedl v. General American Life Ins.*

Co., 248 F.3d 753, 756 (8th Cir. 2001). The Court's rationale was that an arbitrary and capricious standard of review absent an express discretion clause did not give full effect to *Firestone*. *Id.*

2. In *Sloan v. Hartford Life & Accident Ins. Co.*, 475 F.3. 999 (8th Cir. 2007), the court affirmed the lower courts findings of fact via application of *de novo* review of the facts in the record as well as the courts *de novo* review of relevant facts beyond those contained in the administrative record. *Id.* at 1005.

Ninth Circuit

1. In *Kearney* v. *Standard Ins. Co.*, 175 F.3d 1084, 1095-1096 (9th Cir 1999), in applying trust law principles, the Ninth Circuit affirmed the District court's determinations that ambiguity in the policy gave cause for *de novo* review of Standard's denial of benefits.

Although reversing due to a genuine issue of material fact, the Ninth Circuit Court confirmed that, absent an effective discretion clause in the underlying insurance policy, *de novo* review of factual determinations of an administrator is proper. The court remanded to the lower court for a bench trial on the administrative record.

Tellingly, the court elaborated: "[t]hus, trial on the record, even if it consists of no more than the trial judge rereading what he has already read, and making findings of fact and conclusions of law instead of a summary judgment decision, may have real significance." *Id.* at 1095.

2. In *Opeta v. Northwest Airlines Pension Plan for Contract Employees*, 484 F.3d 1211 (9th cir 2007), the court affirmed the lower court's application of *de novo* review (a contested issue) to the facts in the adminstrative record. The court said: "Under *de novo* review, the district court should have determined whether Opeta was entitled to benefits based on the evidence in the administrative record and "other evidence as might be admissible under the restrictive rule of *Mongeluzo." Opeta,,* 484 F.3d at 1217 *(discussing the conditions for allowing the lower court to examine evidence even beyond the administrative record)*

Tenth Circuit

1. In an unpublished 1999 opinion affirming the District Court, the Tenth Circuit Court of Appeals said :

> "[t]he District Court found, and the parties do not dispute, that the UNUM policy under review here does not provide the plan administrator or fiduciary with discretion to determine eligibility for benefits or construe the plan's terms. Therefore, we review *de novo* UNUM's decision to deny plaintiff benefits based on his claim of a physical disability. Pursuant to the order in limine, review of the decision to deny further benefits was limited to the evidence before the plan

> administrator at the time the decision was made"

Rock v. Unum Life Ins. Co. of America, 1999 10CIR 1416, 198 F.3d 258 (10th cir. 1999), *available at* https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=153275, paragraph 7.

2. In *Ray v. Unum Life Ins. Co. of America, a Maine Corporation*, 314 F.3d 482 (10th Cir. 2002), the court, after much discussion, determined that the *de novo* standard of review applied. The court reversed and remanded, specifically directing the lower court to not only conduct a *de novo* review of the facts in the administrative record but also to consider "such additional evidence it finds necessary for adequate *de novo* review, including court-appointed expert reports if it determines them helpful." *Id.* at 488.

Eleventh Circuit

1. In *Torres v. Pittston Co.*, 346 F.3d 1324, 1332 (11th Cir. 2003), the court refused to draw a distinction between law and fact in choosing the standard of review for denial of ERISA benefits. In doing so, the court expressly discussed *Pierre v. Conn. Gen. Life Insurance Company*, 932 F.2d 1552 (5th Cir. 1991) and disagreed with the Fifth Circuit's differing treatment of plan interpretations and factual determinations of administrators. *See Torres*, 346 F.3d at 1329. At issue was if factual determinations are to be reviewed under an arbitrary and capricious standard even if the court was applying a heightened arbitrary and capricious (a less deferential standard of review) to plan

interpretations of a conflicted administrator (one who, as in the instant case, is both insurer and administrator). The court said: "we believe we are bound by precedent to apply the heightened arbitrary and capricious standard both to factual determinations and interpretations of the plan document by an ERISA fiduciary operating with discretionary authority but operating under a conflict of interest." *Id.*

The court also indicated that on remand, the lower court might find that *de novo* review was actually proper and vacated the lower court's ruling that denied Torres the opportunity to supplement the record (add new evidence), allowing for the District Court to reconsider that issue and possibly review additional factual evidence outside the administrative record. *Id.* at 1334-1335.

2. Also in 2003, the Eleventh Circuit, in *Shaw v. Conn. Gen. Life Ins. Co.*, 353 F.3d 1276, 1286, agreed with the District Court's determination that the *de novo* standard of review applied. The Circuit Court said that "the question of whether Shaw is "totally disabled" is a mixed one, involving issues of both plan interpretations and fact. *Id* at 1285. The court then cited *Torres v. Pittston Co.*, 346 F.3d 1324 (11th Cir. 2003) (discussed above), in reiterating that it will not draw a distinction between law and fact when choosing the standard of review for denial of ERISA benefits. *Shaw*, at 1285. The court reversed on other grounds.

District of Columbia Circuit

1. In 2001, the United States Court of Appeals for the District of Columbia Circuit, the court disagreed with the argument of Unum (the administrator) that their requirement of proof of disability amounted to a discretion clause. The court said that such a rule would circumvent *Firestone*, eliminating *de novo* review in almost all cases. *Fitts v. Federal National Mort. Ass. and Unum Life Ins. Co. of America*, 236 F.3d 1 (D.C. Cir. 2001) *at* para. 22. The court remanded for *de novo* review of the facts and directed that the parties be free to supplement the record with current evidence.

In our case, Petitioner, in its Appellant's Brief to the Fifth Circuit (*at* p.40) made the argument that automatically granting deference to an administrator's factual determinations circumvents *Firestone* in most if not all cases.

2. The *Fitts* case was still going in 2008 when the Circuit Court once again remanded back to the lower court for a factual determination of the cause of Ms. Fitts' illness, that is, whether it was a physical cause (for which coverage would exist) or a mental cause (which would be excluded). *See Fitts v. Unun Life Ins. Co. Of America*, No. 07-7097 (D.C. Circuit March 28, 2008) *available at* http://pacer.cadc.uscourts.gov/docs/common/opinions/200803/07-7097-1108107.pdf

CONCLUSION

When this Court, in 1991, denied the writ of certiorary in the case adressing the issue, *Pierre*, 502

U.S. 973, there were only three Circuit Courts to have considered the standard of review applicable to the factual determinations of an administrator. Thus, even though Justices White and Blackmun, in their dissent, *id.*, wrote that they would grant certiorari because the courts were split, the court voted to deny.

Today however, all of the Circuit Courts with jurisdiction to hear such cases (One through Eleven plus the D.C. Circuit) have considered it. Whether their rationale is a regard for trust principles (where the document must contain the deference clause if any deference is to be granted to the trustee's determinations); regard for ERISA's enactment as a statute protective of employee benefits; or the determination that the Supreme Court in *Firestone* meant "factual determinations" when it said "eligibility for benefits", the courts surveyed above have been unanimous in citing *Firestone* in their discussions of the standard of review to apply. Other than the Fifth Circuit Court of Appeals, they have also been unanimous in determining that, under *Firestone,* absent an express discretion clause, an administrator's factual determinations as well as its plan interpretations are to be reviewed *de novo*.

ERISA is a federal statute and should apply equally to all within its coverage. One of the most treasured functions of this Court is to unify federal law across the land. Because the Fifth Circuit is in conflict with the other Circuit Courts in granting deference to the factual determinations of a plan administrator regardless of whether discretion had been reserved, and because this anomaly affords

employees covered by ERISA governed plans less protection than the citizens of the rest of the country against improper insurance claim denials, the Court should grant this Petition and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX ONE

PUBLISHED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 08-20515

GUARDIAN NORA DUTKA, AS GUARDIAN FOR THE ESTATE OF T.M., A MINOR and THE ESTATE OF J.M., A MINOR
Plaintiff-Appellant

v.

AIG LIFE INSURANCE COMPANY
Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before HIGGINBOTHAM, GARZA and PRADO, Circuit Judges.

PATRICK E. HIGGINBOTHAM:

I

The beneficiaries of decedent Istvan Macsai appeal a summary judgment in favor of insurer AIG

in their action to recover accidental death insurance under ERISA. We affirm the denial of benefits.

On September 15, 2005, Macsai was piloting a private plane with two passengers on a reconnaissance flight of deer hunting sites near Cleveland, Texas. The nature of the mission required flight at low altitude. Macsai failed to maintain adequate air speed resulting in a stall/spin from which, at low altitude, there was not time to recover. The crash killed both Macsai and the two passengers.

Mr. Macsai's beneficiaries claimed benefits under an accidental death benefit plan Macsai had enrolled in through his employer, Continental Airlines. The insurer, AIG, originally denied the claim for benefits and Plaintiffs sought administrative review. The ERISA Appeals Committee of AIG reviewed and upheld the denial, finding that the accident fell under the Plan's exclusion for losses "caused in whole or in part by, or resulting in whole or part from...the Insured Person being under the influence of drugs or intoxicants."

Plaintiffs then sought district court review of the denial under ERISA, 29 U.S.C. 1132(a)(1)(B). On cross motions for summary judgment, the district court ruled that AIG did not abuse its discretion in determining that the Plan's intoxication exclusion applied. It based its ruling on the "uncontroverted evidence" in an NTSB accident report, FAA toxicology report, and the opinion of an expert engaged by AIG. Plaintiffs now appeal, challenging

the district court's standard of review and its factual findings.

II

The parties dispute both the standard of review that was applied by the district court in reviewing AIG's decision and that which should be applied by this Court in reviewing the ruling of the district court. The law is straightforward on this score. The Supreme Court in *Firestone Tire and Rubber Co. v. Bruch* held that a district court reviewing a final denial of benefits under ERISA is to apply a *de novo* review unless the plan gives the administrator "discretionary authority to determine eligibility for benefits or to construe the terms of the plan" [1] While the parties here contest the existence of a discretion clause in the plan, this Circuit reads *Bruch* as speaking only to questions of law; thus, with or without a discretion clause, a district court rejects an administrator's factual determinations in the course of a benefits review only upon the showing of an abuse of discretion.[2]

The district Court in this case reviewed a factual determination. AIG denied the claim because it determined that the decedent's intoxication was a cause of the crash. In the ERISA context, we have considered the question of the cause of death to be a factual determination.[3] Accordingly, the district court did not err in employing an abuse of discretion standard to review to AIG's similar determination that the crash was caused in part by the decedent's intoxication.[4]

On Appeal, this court reviews the district court's grant of summary judgment *de novo*.[5] Thus, we consider the district court's decision using its same perspective-reviewing the adminstrator's legal interpretations *de novo*, and giving discretion to its factual determinations.

III

In applying the abuse of discretion standard to an administrator's factual determinations we analyze whether the administrator acted arbitrarily or capriciously.[6] If the determination is supported by substantial evidence, it is not arbitrary and capricious.[7] "Substantial evidence is 'more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[8]

Under this standard, the plan administrator did not abuse its discretion in finding that the crash was caused by the pilot's intoxication. This is not to say there were not weaknesses in the evidence, as pointed out by Appellants. The FAA forensic toxicology report showed the chemicals in the decedent's blood *at the time they were tested*, over fifty days after the accident. The evidence presented by appellee's expert Dr. Lage was not unequivocal as to the content of drugs present in the decedent's blood *at the time of the accident*, particularly as to cocaine. He opined that the decedent "had recently illegally used cocaine, had used alcohol, and had taken the prescription drug Propoxyphed within a few hours of his death." However, he also reasoned that based on the levels of Benzoylecgonine present

in decedent's urine a the time of the toxicology report, he "[c]ould not rule that cocaine may have been present in his blood at the time of his death." It betrays logic to jump from inability to rule out cocaine use to opining to "a reasonable degree of scientific medical certainty" that the decedent "used cocaine...within a few hours of his death."

Despite this gap in Dr. Lage's reports, the FAA toxicology report did disclose the presence of chemicals in the decedent's body consistent with the use of multiple drugs around the time of the accident. Dr' Lage's reports, at the least, explained the relationship of the chemicals in the blood and urine to his use of particular drugs. His reports also conclusively show that the decedent had a therapeutic dose of the narcotic Propoxyphene in his body at the time of his death. And while Dr. Lage's opinion as to alcohol and cocaine may not rise to the level of making it more likely than not that the decedent was under the influence of these drugs during his last flight, the evidence is consistent with that conclusion. With evidence that the decedent was under the influence of Propoxyphene at the time of the crash and that had recently used alcohol and cocaine, we cannot find arbitrary and capricious the administrator's conclusion that the decedent was intoxicated at the time of the crash.

Appellant's also challenge that the decedent's intoxication was a cause of the crash. They specifically point to the district court's statement that "[there is no proof that the drugs in the Decedent's system were a cause of the fatal crash, but the administrator's conclusion that they were is

not unreasonable in light of the uncontroverted evidence." We agree with the district court that there was no *direct* proof that the drugs caused the crash, however, in such a case there rarely is-the evidence is circumstantial. The nature of the accident itself supports the conclusion that drugs contributed. In good visual meteorological conditions and with no evidence of mechanical failure, as the NTSB report found in this case, the failure to maintain airspeed at low altitude is a fundamental piloting error making it reasonable to conclude that the accident resulted in part from the pilot being under the influence of drugs.

The plan administrator's decision that the crash was caused in part by the influence of drugs was not arbitrary and capricious. The judgment of the district court is AFFIRMED.

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[1] 489 U.S. 101. 115.

[2] *Pierre v. Conn. Gen. Life Ins. Co.*, 932 F.2d 1552, 1562 (5th Cir. 1991) ("[W]e hold that for factual determinations under ERISA plans, the abuse of discretion standard of review is the appropriate standard; that is, federal courts owe due deference to an administrator's factual conclusions that reflect a reasonable and impartial judgment.").

[3] *See Thomas v. AIG Life Ins. Co.*, 244 F.3d 368, 369 (5th Cir. 1991) ("Because *Pierre* specifically applied the abuse of discretion standard to an accidental death finding, we do so as well.")

[4] Because the plan administrator made a factual determination in this case, which under this Circuit's settled caselaw we review for an abuse of discretion, it is of no moment that a clause giving AIG discretion is found only in the Summary Plan Description and not in the actual policy. Appellant's argument

that the Summary Plan Description was written by Continental and not AIG is inapposite.

[5] *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 205 (5th Cir. 1998).

[6] *Meditrust Fin. Servs. Co. v. Sterling Chems., Inc.*, 168 F.3d 211, 214 (5th Cir. 1999). When a plan administrator both evaluates and pays claims, it operates under a conflict of interest that we weigh as a factor in determining whether there is an abuse of discretion. *Metro Life Ins. Co. v. Glenn*, 128 S.Ct. 2343 (2008). Appellants adduced no evidence in this case that AIG's conflict affected the benefits decision and in light of the evidence supporting the plan administrator's decision, the conflict of interest is not a "tiebreaking" factor. *Id.* at 2351.

[7] *Id.* at 215

[8] *Ellis v. Liberty Life Assurance Co.*, 394 F.3d 262, 273 (5th Cir. 2004) (quoting *Deters v. Sec'y of Health, Educ. & Welfare*, 789 F.2d 1181, 1185 (5th Cir. 1986)

APPENDIX TWO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NORA DUTKA, AS GUARDIAN FOR THE ESTATE OF J.M., A MINOR, and THE ESTATE OF T.M., A MINOR,
Plaintiff,

v.

AIG LIFE INSURANCE COMPA⁹NY,
Defendant.

CIVIL ACTION NO. 4:07-cv-4316

MEMORANDUM AND ORDER

Plaintiff and Defendant have each filed motions for summary judgment. (Doc. Nos. 20 & 39, respectively.) The underlying issue is whether Plaintiff is entitled to the proceeds of the insurance due on the life of her former husband, who was also the father of the two minors on whose behalf Plaintiff sues. For the reasons that follow, Plaintiff's Motion must be DENIED and Defendant's GRANTED.

I. HISTORY

The following facts are uncontested.

Decedent Istvan Macsai ("Decedent") was, at the time of his death, an employee of Continental Airlines and enrolled in the Continental accidental death and dismemberment benefit plan (the "Plan") issued by Defendant, in a principal amount of $500,000. The Plan provides coverage for certain losses; the terms of coverage appear in the governing policy of insurance (the "Policy"). (*See* App. to Def.'s Mot. Summ. J., Doc. No. 39, at A1G0274-324.) Decedent's two minor children were the beneficiaries of the Policy. On September 15, 2005, Decedent and two passengers were killed when an airplane he was piloting crashed. There were no surviving witnesses to the accident. The parties agree that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §~ 1001 *et. seq.*, governs the Plan.

Plaintiff subsequently made a claim for benefits on behalf of the minor beneficiaries. One of Defendant's employees later informed Plaintiffs counsel that she was recommending denial of the claim. Plaintiff sought review of the original claim denial, but another of Defendant's employees adhered to the original denial. Plaintiff then sought an administrative review (also called an "administrative appeal"), which was performed by the "ERISA Appeals Committee of AIG Life Insurance Company." The denial was maintained. (App. to Def.'s Mot. Summ. J., Doc. No. 39, at AIGOO11-12.) Plaintiff later filed this proceeding.

The dispute between the parties centers on the Policy's exclusions. In particular, the Policy provides that it "does not cover any loss caused in whole or in part by, or resulting in whole or in part from, the

following:.. . 5. the Insured Person being under the influence of drugs or intoxicants, unless taken under the advice of a Physician . . ." (App. to Def.'s Mot. Summ. J., Doc. No. 39, at A1G0323.) The parties disagree as to whether Decedent can be said to have been "under the influence of drugs or intoxicants" at the time of the crash, whether any such influence caused the crash, and whether AIG's denial of Plaintiff's claim should be reviewed under an abuse of discretion, or other, standard of review.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment under Federal Rule of Civil Procedure 56 requires the Court to determine whether the moving party is entitled to judgment as a matter of law based on the evidence thus far presented. FED. R. Civ. P. 56(c). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kee v. City of Rowlett*, 247 F.3d 206, 210 (5th Cir. 2001) (quotations omitted). A genuine issue of material fact exists if a reasonable jury could enter a verdict for the non-moving party. *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000). The Court views all evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Id.* Conclusory allegations, unsubstantiated assertions, and unsupported speculation are not competent summary judgment evidence. *See, e.g., Eason v. Thaler*, 73 F.3d 1322,

1325 (5th Cir. 1996); *see also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (noting that a non-movant's burden is "not satisfied with 'some metaphysical doubt as to the material facts.") (*quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.s. 574, 586 (1986)). Cross motions for summary judgment do not alter the basic Rule 56 standard; instead the Court must determine whether either of the parties deserves judgment on the facts that are not disputed.

A further qualification must be noted as to cases, like this one, that are to be tried to the Court without a jury. The Fifth Circuit has held that

> [A] court in a non-jury case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions. But summary judgment is not appropriate if the same case is to be tried to a jury, and the inferences and conclusions to be drawn are genuinely disputed. To put it in another fashion, whether disputed issues are issues of 'fact' for purposes of Rule 56 depends not only on the state of the evidence and the nature of the issues but hinges also on whether the litigants have a right to a jury determination.

Nunez v. Superior Oil Co., 572 F.2d 1119, 1124 (5th Cir. 1978) ; *see also, e.g., USF&Gv. Planter's Bank & Trust Co.*, 77 F.3d 863, 865-66 & n. 1 (5th Cir. 1996);

Matter of Placid Oil Co., 932 F.2d 394, 397-98 (5th Cir. 1991).

III. THE EVIDENCE

Following its investigation into the crash, the National Transportation and Safety Board ("NTSB") reported in April 2006 that pilot error had been the cause. (App. to Def.'s Mot. Summ. J., Doc. No. 39, at AIG0069-72, AIG0128-29.) The NTSB determined that Decedent failed to maintain airspeed, resulting in a stall or spin. Low altitude was also cited as a contributing cause of the crash. Neither weather nor poor visibility contributed to the crash, and there was no sign of mechanical malfunction.

Prior to the NTSB report, the Civil Aeromedical Institute Forensic Center of the Federal Aviation Administration issued a Final Forensic Toxicology Fatal Accident Report. (App. to Def.'s Mot. Summ. J., Doc. No. 39, at AIG130-31.)[1] The report noted that no cocaine was found in Decedent's blood, but cocaine was detected in Decedent's urine, and propoxyphene (marketed as "Darvon") was found in both Decedent's blood and urine. Alcohol was not detected.

After Plaintiff submitted her claim for accidental death benefits, Defendant forwarded the claim documentation to Dr. Gary L. Lage, an expert in forensic toxicology. There does not appear to be any dispute as to Dr. Lage' s qualifications to serve as an expert in this capacity. Dr. Lage opined to a "reasonable degree of scientific certainty, that [Decedent} had recently illegally used cocaine, had

used alcohol, and had taken the prescription drug propoxyphene within a few hours of his death; however, it is not clear if this drug was prescribed." (App. to Def.'s Mot. Summ. J., Doc. No. 39, at AIG0078, AIG0101, AIG0136.) Defendant subsequently checked with fifteen drug stores near Decedent's residence and found no evidence that the drug had been prescribed. (App. to Def.'s Mot. Summ. J., Doc. No. 39, at AIGOO16-21.)[1] More importantly, Plaintiff has not come forward with any such evidence. (*See* App. to Def.'s Mot. Sumin. J., Doc. No. 39, at A1G0062.).

Dr. Lage went on to explain that he felt ingestion of cocaine and propoxyphene was inconsistent with the safe operation of an aircraft. (App. to Def.'s Mot. Summ. J., Doc. No. 39, at AIG0078.) Although the amount of propoxyphene found was not inconsistent with that which would normally be prescribed, Dr. Lage felt that the drug might have had effects more severe in someone who did not regularly take the medicine than those that would have been experienced by a person who had regularly used the drug pursuant to a prescription. (App. to Def.'s Mot. Summ. J., Doc. No. 39, at AIG0077-78.) Dr. Lage also opined that, even when blood is properly preserved, signs of cocaine in blood decrease over time, and that cocaine may have been in Decedent's blood at the time of the crash. (App. to Def.'s Mot. Summ. J., Doc. No. 39, at A1G0077.)

Unfortunately, Plaintiff did not submit an expert report to challenge or rebut Dr. Lage's findings and conclusions. Plaintiff does argue that no

one who saw Decedent before the flight suggested he was anything other than fully capable; that Decedent exhibited highly cognitive behavior on the day of the crash by preparing, flying, and navigating an airplane to a specific area; that there is no evidence that Decedent ever had operated an aircraft, or even an automobile, while under the influence; that not even Defendant's expert claims that Decedent was intoxicated; and that there is no evidence that, even if Decedent had consumed propoxyphene or cocaine, it had anything to do with the aircraft's crash.

IV. THE STANDARD OF REVIEW BY WHICH ALJ'S (sic) BENEFIT DETERMINATION IS TO BE REVIEWED

The parties disagree sharply as to which standard of review is applicable to ALJ's (sic) decision to deny Plaintiff's claim. Plaintiff, however, rests her argument on a decision by another Circuit's Court of Appeals. *Williams v. BellSouth Telecommunication*, 373 F.3d 1132, 1138 (11th Cir. 2004). Although the standard of review set forth in Williams may one day be the law in the Fifth Circuit, it is not at present.

In the Fifth Circuit, the standard of review for actions challenging benefits determinations depends on whether a court is asked to review an issue of plan interpretation or an administrator's factual determination. If the latter, the Fifth Circuit has held that the administrator's decision is entitled to deferential review regardless of what other provisions are found in the plan at issue. *Pierre v. Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552, 1558,

1562 (5th Cir. 1991). ("We believe that an abuse of discretion standard best balances the need to respect the plan administrator's factual determinations and the need to protect beneficiaries by providing some judicial review of those decisions"). Accordingly, under this standard, the administrator's factual determinations are upheld unless the administrator acted arbitrarily or capriciously. *See Meditrust Fin. Servs. Corp. v. Sterling Cherns.*, 168 F.3d 211, 213-14 (5th Cir. 1999). In *Meditrust* as in this case, the issue was how to apply a plan term to specific conduct.

There is no obligation on the part of the administrator to conduct any investigation beyond reviewing the documents that a claimant has submitted. *Vega v. Nat. Life Ins. Servs., Inc.*, 188 F.3d 287, 298-99 (5th Cir. 1999) (en banc). The administrator's decision is not to be overturned "if a reasonable person could have reached a similar decision, given the evidence before him." *McCall v. Burlington Northern/Santa Fe Co.*, 237 F.3d 506, 512 (5th Cir. 2000).

Plaintiff also urges that a different standard of review should apply because Defendant had a conflict of interest in that the administrator worked for the entity that would have to pay the claim if approved. The Fifth Circuit has confronted this question and adhered to the abuse of discretion standard, but with a "sliding scale" that adjusts with the severity of the conflict. *Ellis v. Liberty Life Assurance Co.*, 394 F.3d 262, 270 (5th Cir. 2005) (citing Vega, 188 F.3d at 297). Plaintiff has adduced no evidence that a conflict of interest caused Defendant to reach a different decision than would

have been reached by a filly independent administrator.

V. CONCLUSION

Although denying benefits to minor beneficiaries is never easy, the record in this case admits of no other decision. There is no dispute that cocaine and a prescription drug for which Decedent apparently had no prescription were found in Decedent's system. Plaintiff offered no expert report to counter that of Defendant. The language of the exclusion did not refer to "intoxication," only "under the influence." There is no proof that the drugs in Decedent's system were a cause of the fatal crash, but the administrator's conclusion that they were is not unreasonable in light of the uncontroverted evidence.

Plaintiffs Motion for Summary Judgment (Doc. No. 20) is DENIED. Defendant's Motion for Summary Judgment (Doc. No. 39) is GRANTED. This case is
DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

SIGNED this 14th day of July, 2008.

s/ KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

TO ENSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY

EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT

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1 The Court notes that, in contrast to the Final Forensic Toxicology Fatal Accident Report, Dr. Lage's report concludes that Decedent "had used alcohol." Dr. Lage does not offer his reasons for this conclusion. Whether or not Decedent had used alcohol, however, does not affect the Court's analysis in light of the evidence in the record showing Decedent had used cocaine and propoxyphene.

(2)

No. 09-347

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

NORA DUTKA, AS GUARDIAN FOR THE ESTATE OF T.M., A MINOR, AND THE ESTATE OF J.M., A MINOR,
Petitioner,

v.

AIG LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent AIG Life Insurance Company (AIG) is the claims administrator for an accidental death policy offered under an employee benefits plan covered by ERISA. The plan documents delegate discretion to AIG to interpret and apply the exclusions to the policy. AIG denied petitioner's claim for benefits arising out of the death of her former husband under an exclusion to the policy for accidental death caused by the use of drugs. Uncontroverted expert testimony demonstrated that the decedent crashed his airplane because he was impaired by the use of cocaine and a prescription narcotic. The question presented is:

Whether the district court and court of appeals erred by upholding AIG's factual determination that the decedent was under the influence of drugs and that his drug use caused his death.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent AIG Life Insurance Company states that it is wholly owned by its parent company American International Group, Inc., which is a publicly held company.

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IN THE

Supreme Court of the United States

No. 09-347

NORA DUTKA, AS GUARDIAN FOR THE ESTATE OF T.M., A MINOR, AND THE ESTATE OF J.M., A MINOR,

Petitioner,

v.

AIG LIFE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner presents the question of what standard of review courts must apply to factual determinations made by an ERISA administrator "absent an express discretion clause in an ERISA governed insurance plan." Pet. i. This case, however, does not present that question. The plan documents here in fact grant discretion to the administrator to determine eligibility for benefits. This case also presents a poor vehicle for review because the outcome would be the same regardless of the standard applied. For these reasons, the Court should deny the petition.

STATEMENT

I. BACKGROUND

This case arises from the death of Istvan Macsai. Macsai was piloting a plane with two passengers near Cleveland, Texas. Pet. App. 2. Flying at a low altitude while scouting hunting sites, he failed to maintain adequate air speed and crashed, killing himself and his passengers. *Ibid.*

The National Transportation and Safety Board's (NTSB) investigation determined that pilot error had been the cause of the crash. Pet. App. 11. Neither weather nor poor visibility contributed to the crash, and there was no sign of mechanical malfunction. *Ibid.*

The Federal Aviation Administration (FAA) issued a forensic toxicology report. Pet. App. 11. Cocaine was detected in Macsai's urine, and a narcotic known as propoxyphene was detected in Macsai's blood and urine. Pet. App. 5, 11.

Macsai's ex-wife, Nora Dutka (petitioner here), claimed benefits on behalf of her minor children under an accidental death policy Macsai had enrolled in through his employer, Continental Airlines. Pet. App. 2. The policy was part of a comprehensive welfare benefit plan offered by Continental. C.A. App. 556, 705. The plan is governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* Pet. App. 8.

The plan identifies Continental as the plan administrator and respondent AIG Life Insurance Company (AIG) as the claims administrator for the accidental death policy. C.A. App. 556, 562, 565. As the claims administrator, AIG is responsible for processing claims and administering benefits under the plan's terms. *Id.* at 556. In the Summary Plan Description, Continental delegated full and final discretionary

authority to AIG for making the benefits determinations at issue in this case: "All decisions concerning exclusions and limitations under the plan shall be in the sole discretion of the insurance company." *Id.* at 713.

The accidental death policy contains an exclusion, providing that it "does not cover any loss caused in whole or in part by, or resulting in whole or in part from * * * the Insured Person being under the influence of drugs or intoxicants, unless taken under the advice of a Physician." Pet. App. 8-9.

After Dutka submitted her claim for accidental death benefits, AIG forwarded the claim documentation to Dr. Gary Lage, an expert in forensic toxicology. Pet. App. 11. Dr. Lage concluded with a "reasonable degree of scientific certainty, that [Macsai] had recently illegally used cocaine, had used alcohol, and had taken the prescription drug propoxyphene within a few hours of his death." *Id.* at 11-12. Dr. Lage found no evidence that the drug had been prescribed, and Dutka never produced evidence to the contrary. *Id.* at 12. Dr. Lage declared that ingestion of cocaine and propoxyphene was inconsistent with the safe operation of an aircraft. *Ibid.* Dutka did not submit an expert report to challenge or rebut Dr. Lage's conclusions. *Ibid.*

AIG denied Dutka's claim for benefits under the policy exclusion for accidents caused by drugs. Pet. App. 2, 8. AIG's ERISA Appeals Committee affirmed the denial. Pet. App. 8.

II. Proceedings Below

A. The District Court's Ruling

Dutka filed suit in the District Court for the Southern District of Texas under ERISA, which provides a cause of action "to recover benefits due to [a beneficiary] under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). Dutka argued that her claim is not barred by the policy

exclusion because Macsai was not under the influence of drugs at the time of the crash and that any such influence was not the cause of the crash. Pet. App. 9. Addressing cross-motions for summary judgment, Judge Keith Ellison granted AIG's motion and denied Dutka's. *Id.* at 8-16.

The district court observed that "[i]n the Fifth Circuit, the standard of review for actions challenging benefits determinations depends on whether a court is asked to review an issue of plan interpretation or an administrator's factual determination." Pet. App. 13. Factual determinations, like the ones at issue here, are reviewed under an abuse of discretion standard, "regardless of what other provisions are found in the plan at issue." *Id.* at 13-14 (citing *Pierre* v. *Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552, 1558, 1562 (5th Cir. 1991)).

The district court summarily concluded that AIG did not abuse its discretion:

> Although denying benefits to minor beneficiaries is never easy, the record in this case admits of no other decision. There is no dispute that cocaine and a prescription drug for which Decedent apparently had no prescription were found in Decedent's system. Plaintiff offered no expert report to counter that of Defendant.

Pet. App. 15. Moreover, "the language of the exclusion did not refer to 'intoxication,' only 'under the influence.'" *Ibid.* Consequently, while there was no direct proof of causation, the district court concluded that the "uncontroverted evidence" supported the reasonableness of AIG's conclusion that "the drugs in Decedent's system were a cause of the fatal crash." *Ibid.*

B. The Court of Appeals' Ruling

The Court of Appeals for the Fifth Circuit affirmed. Pet. App. 1-7.

Judge Higginbotham, writing for the court, agreed that the abuse of discretion standard applied to AIG's factual finding that the airplane crash was caused at least in part by Macsai's drug use. Pet. App. 3. The court of appeals noted that "the parties here contest the existence of a discretion clause in the plan." *Ibid.* But the court explained that under the Fifth Circuit's decision in *Pierre*, *supra*, "a district court rejects an administrator's factual determinations in the course of a benefits review only upon the showing of an abuse of discretion" "with or without a discretion clause." Pet. App. 3, 6 n.2. The court therefore had no occasion to determine whether Continental's grant of discretionary authority to AIG in the Summary Plan Description would itself require abuse of discretion review. *Id.* at 3, 6-7 n.4.

Reviewing the evidence before the district court, the court of appeals concluded that "the plan administrator did not abuse its discretion in finding that the crash was caused by the pilot's intoxication." Pet. App. 4. While the evidence was of necessity not conclusive as to the drugs in Mascai's blood "*at the time of accident*"—the FAA did not run its toxicology report until fifty days later—Dr. Lage's reports "conclusively show that the decedent had a therapeutic dose of the narcotic Propoxyphene in his body at the time of his death." *Id.* at 4, 5. Moreover, the FAA report "disclose[d] the presence of chemicals in the decedent's body consistent with the use of multiple drugs around the time of the accident." *Id.* at 5. Thus, "the evidence is consistent with" Dr. Lage's conclusion that Mascai had used cocaine and alcohol shortly before his death. *Ibid.*

While the court of appeals "agree[d] with the district court that there was no *direct* proof that the drugs caused the crash," it observed that "in such a case there rarely is—the evidence is circumstantial." Pet. App. 6. And here the circumstantial evidence was strong. "In

good visual meteorological conditions and with no evidence of mechanical failure, as the NTSB report found in this case, the failure to maintain airspeed at low altitude is a fundamental piloting error making it reasonable to conclude that that the accident resulted in part from the pilot being under the influence of drugs." *Ibid.*

Dutka did not seek rehearing en banc. This petition followed.

REASONS FOR DENYING THE PETITION

The petitioner asks this Court to resolve the standard of review that applies to an ERISA administrator's factual determinations, absent a clause in the plan granting discretion to the administrator. Pet. i. This case presents an especially poor vehicle for deciding that issue. Here, the plan documents expressly grant discretionary authority to AIG to determine whether Dutka is eligible for the benefits she seeks. While Dutka argued below that the discretionary clause is not binding for various reasons, neither of the lower courts reached the issue due to the Fifth Circuit's rule that deferential review applies regardless of the existence of a discretionary clause. Thus, in order to even reach the question presented, this Court would need to decide, in the first instance, whether a valid discretionary clause governs this case. That would be inconsistent with this Court's role as a court of review, not first view. Even more importantly, it is highly unlikely that the Court could reach the question presented, in light of the plan documents' plain language granting discretion to AIG. If this Court wishes to resolve the standard of review applicable to an administrator's factual findings in the absence of a discretionary clause, it should await a petition that squarely presents that issue.

This case is a poor vehicle for an additional reason. AIG's decision to deny benefits would be affirmed under either a *de novo* or an abuse of discretion standard. Uncontroverted expert testimony, from both the FAA and a private expert, showed the presence of illegal drugs in Mascai's body. The NTSB report reflected that the crash was caused by an otherwise unexplained fundamental piloting error. As the district court put it, "the record in this case admits of no other decision" than that reached by AIG. This Court ought not grant review in a case where the outcome is the same regardless of which test applies.

I. This Case Does Not Afford an Opportunity To Address The Question Presented in the Petition

The petition presents the following question: "Whether, *absent an express discretion clause in an ERISA governed insurance plan*, the factual determinations of the administrator are subject to *de novo* review by the courts." Pet. i (emphasis added). Dutka asserts that a circuit split exists on that question. But, by its terms, the question presented does not apply to a claim governed by a discretionary grant of authority to the administrator. Such a discretionary clause exists here. Consequently, this case presents an exceptionally poor vehicle for this Court to resolve the question presented. Indeed, the Court likely could not reach the question at all.

A. The Existence of a Discretionary Clause Necessitates Deferential Review of a Plan Administrator's Benefit Determinations

Although Dutka argues for *de novo* review of factual determinations in the absence of a discretionary clause, there is no dispute that a valid discretionary clause requires courts to apply an abuse of discretion standard.

This Court first addressed the standard of review for ERISA claims in *Firestone Tire and Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989). The relevant dispute was whether Firestone, acting as administrator of its ERISA plan, had properly interpreted the plan term "reduction in work force" in denying termination benefits to former employees. *Id.* at 106-108. The Court granted certiorari to determine the appropriate standard by which courts would review an administrator's interpretation of plan terms in an action under 29 U.S.C. § 1132(a)(1)(B). *Id.* at 108.

At the outset of its analysis, the Court cautioned that "[t]he discussion which follows is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denial of benefits *based on plan interpretations*." *Firestone*, 489 U.S. at 108 (emphasis added). The Court rejected the majority view of the lower courts that arbitrary and capricious review applied to an administrator's plan interpretation. *Id.* at 109. The Court disagreed with lower courts' analogy to the Labor Management Relations Act, concluding that "[a] comparison of the LMRA and ERISA * * * shows that the *wholesale* importation of the arbitrary and capricious standard into ERISA is unwarranted." *Ibid.* Instead, relying on the purpose of ERISA, principles of trust law, and the fact that courts routinely interpret contracts as a matter of law, the Court determined that *de novo* review should apply to matters of plan interpretation. *Id.* at 110-115.

The Court carefully noted, however, that "trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Id.* at 111. Therefore, in stating its holding, the Court made clear that deferential review would apply when a plan grants discretionary authority to the plan administrator: "[W]e hold that a denial of benefits

challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administor or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115.

In *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S.Ct. 2343 (2008), this Court reaffirmed that abuse of discretion review applies when the administrator has discretionary authority to determine whether an employee's claim for benefits is valid. *Id.* at 2348. The Court went on to hold that this deferential standard applies even when the claims administrator is also the payor of benefits under the policy, *id.* at 2350, although this conflict of interest may be a "factor" in assessing whether to uphold an administrator's determinations. *Id.* at 2351.[1]

Dutka asserts a circuit split regarding whether, absent a clause granting discretion to the administrator, *Firestone*'s *de novo* standard applies not just to plan interpretation, but also to an administrator's factual determinations. See, *e.g.*, *Pierre* v. *Connecticut Gen. Life Ins. Co.*, 502 U.S. 973 (1991) (White, J., dissenting from denial of certiorari). But Dutka does not dispute that deferential review applies when the plan grants discretionary authority to the administrator. Nor, in light of this Court's clear guidance, is there any division among the circuits on that issue.

B. The Plan Documents Here Delegate Discretionary Authority to AIG to Determine Eligibility for Benefits

At every stage of this case, AIG has argued that deferential review is appropriate because plan documents

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[1] The petition does not present any questions relating to the court of appeals' application of *Metropolitan Life*. See Pet. App. 7 n.6.

delegate discretionary authority to AIG, as the claims administrator, to determine eligibility for benefits.

The plan documents identify Continental Airlines as the plan administrator and AIG as the claims administrator for the accidental death policy. C.A. App. 556, 562, 565. As the plan administrator, Continental is a "named fiduciary" under ERISA. See 29 U.S.C. § 1102(a)(2). The plan documents grant Continental's benefits committee the "authority and discretion to interpret the plan and finally resolve any questions regarding the application of the provisions of the plan." C.A. App. 556.

As authorized by ERISA, Continental delegated some of its discretionary authority to interpret and apply the plan to AIG. See 29 U.S.C. § 1105(c)(1). The plan documents provide that AIG is responsible for processing claims and administering benefits under the plan's terms. C.A. App. 556, 565. The Summary Plan Description issued by Continental expressly declares that "[a]ll decisions concerning exclusions and limitations under the plan shall be in the sole discretion of the insurance company." *Id.* at 713. This delegation grants AIG the discretion to make precisely the determination at issue in this case: whether Macsai's death falls within the policy exclusion for accidents caused by drug use.

Under the principles of *Firestone* and *Metropolitan Life*, there can be no serious dispute that AIG's discretionary authority to determine benefits eligibility requires application of an abuse of discretion standard. As then-Judge McConnell accurately summarized the case law: "If a plan administrator has been allotted discretionary authority"—as Continental has here—"the decisions of both it *and its agents* are entitled to judicial deference." *Geddes* v. *United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 927 (10th Cir. 2006) (emphasis added). Thus, courts have consistently applied

abuse of discretion review when a plan administrator delegates its discretion to another, such as a claims administrator like AIG. See, *e.g.*, *id.* at 923-927 (named fiduciary's delegation of discretionary authority to insurance company as claims administrator warranted deferential standard of review); *Terry* v. *Bayer Corp.*, 145 F.3d 28, 37-38 (1st Cir. 1998) (named fiduciary's delegation of discretionary authority to benefits committee warranted deferential review); *Chevron Chem. Co.* v. *Oil, Chem. & Atomic Workers Local Union 4-447*, 47 F.3d 139, 143-144 (5th Cir. 1995) (named fiduciary's delegation of discretion to Review Authority warranted deferential standard of review); *Madden* v. *ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1283-1285 (9th Cir. 1990) (named fiduciary's delegation of discretionary authority to insurance company as claims administrator warranted deferential standard of review).

C. The Existence of a Discretionary Clause Makes This Case a Poor Vehicle for Deciding the Question Presented

The courts below had no occasion to decide whether the discretionary clause requires deferential review because Fifth Circuit precedent dictates abuse of discretion review of factual determinations regardless of the existence of a discretionary clause. See Pet. App. 3 (noting that parties "contest the existence of a discretion clause in the plan," but finding no need to resolve the dispute); *id.* at 6-7 n.4. This Court, however, would have to decide whether the discretionary clause is binding in order to reach the question presented in the petition.

The petition hints at a variety of arguments as to why the discretionary clause should not require deferential

review. Pet. 3.[2] This Court would need to consider those arguments in the first instance, without the benefit of any lower court analysis, and resolve them in Dutka's favor in order to reach the question presented in the petition. That would be inconsistent with this Court's role as a court of "final review, not first view." *F.C.C.* v. *Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1809 (2009). This Court should not grant certiorari to resolve a circuit split on the question presented when it would first have to resolve a logically antecedent issue outside the scope of that question, which has never been decided below, and regarding which no division of authority has been alleged.

More importantly, for the reasons set forth *supra*, at 7-11, this Court would likely conclude that Continental's delegation of discretionary authority to AIG to process claims and interpret policy exclusions is valid and binding in this case. In that case, abuse of discretion review would indisputably apply. That outcome would make a grant of certiorari a futile act, as the Court would be unable to reach the question presented.

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[2] For instance, Dutka notes that the insurance policy itself does not contain a discretionary clause. Pet. 3. But that is not surprising since the policy's role is to set forth the scope of coverage, while plan documents such as the Summary Plan Description allocate discretion between the named fiduciary (Continental) and the claims administrator (AIG). Nor, as Dutka implies, does the Summary Plan Description "conflict" with other plan documents. See *ibid.* The plan itself is not in the record, and there is no reason to believe that it conflicts with the Summary Plan Description. And to the extent the insurance policy is properly considered a "plan document," it simply does not address the issue of AIG's discretion; it does not "conflict" with the Summary Plan Description's delegation of discretionary authority to AIG. Finally, Dutka's unfounded assertions about the procedural and evidentiary provenance of the Summary Plan Description only underscore the unworthiness of this case for certiorari. See *ibid.*

If the Court wishes to resolve the standard of review for factual determinations absent a discretionary clause, it should await a case involving a plan that does not contain such a clause. In the meantime, there appears to be no great urgency to address the issue. According to petitioner, only the Fifth Circuit applies deferential review to factual determinations in the absence of a discretionary clause. And, as this Court has recognized, the "lion's share" of ERISA plans grant discretionary authority to the administrator. *Metropolitan Life*, 128 S.Ct. at 2350. Thus, the alleged circuit split appears to be affecting only a small fraction of beneficiaries in one circuit—those who seek to challenge factual determinations under the minority of plans that do not grant discretion to the administrator. Furthermore, while this Court awaits an appropriate vehicle to address the question presented, the Fifth Circuit may well grant a petition for rehearing en banc and bring its views into line with the majority of the courts of appeals.

II. This Case Presents a Poor Vehicle Because the Outcome Would Be the Same under Petitioner's Standard of Review

This case is not an appropriate vehicle for addressing the standard for reviewing factual determinations for an additional reason: the standard of review proffered by petitioner would not alter the outcome. AIG's denial of benefits is correct even under *de novo* review.

The question before AIG was whether Macsai's death was "caused in whole or in part by * * * the Insured Person being under the influence of drugs or intoxicants, unless taken under the advice of a Physician." Pet. App. 8-9. The preponderance of evidence in the record supports AIG's conclusion that Macsai was at least "under the influence" of drugs and that his drug use was at least a "part[ial]" cause of the accident.

The expert reports of the FAA and Dr. Lage were wholly "uncontroverted" by Dutka. Pet. App. 15. The FAA toxicology report stated that both cocaine and a prescription narcotic were found in Macsai's body fifty days after the accident. *Id.* at 5, 11. Dr. Lage testified without contradiction that these results proved to "a reasonable degree of scientific certainty, that [Macsai] had recently illegally used cocaine * * * and had taken the prescription drug propoxyphene within a few hours of his death." *Id.* at 11-12. Dr. Lage concluded, again without contradiction, that the ingestion of cocaine and propoxyphene would have impaired Macsai's ability to operate the aircraft. *Id.* at 12.

When the circumstantial evidence from the NTSB report is added to the uncontroverted evidence that Macsai was impaired by drug use at the time of the crash, AIG's conclusion regarding causation is amply supported. Visibility and weather were good. Pet. App. 15. There was no sign of mechanical failure. *Ibid.* Yet Macsai committed a fundamental piloting error, for which Dutka provided no alternate explanation. *Ibid.*

Given this uncontested record, AIG's determination that Macsai's accident falls with the policy exclusion would be sustained under *de novo* review. Dutka certainly does not cite any cases reversing an administrator's factual determination on similar facts under *de novo* review. The dispute over the standard of review is merely academic in this case.

Because the court of appeals' decision is correct regardless of the standard of review, this case does not present a suitable vehicle for resolving the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-347

In The

Supreme Court of the United States

GUARDIAN NORA DUTKA, AS GUARDIAN FOR THE ESTATE OF T.M., A MINOR, and THE ESTATE OF J.M., A MINOR

v.

AIG LIFE INSURANCE COMPANY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING

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QUESTION PRESENTED

Whether, absent an express discretion clause in an ERISA governed insurance plan, the factual determinations of the administrator are subject to *de novo* review by the courts.

PARTIES TO THE PROCEEDINGS

The parties below are included in the caption. They are:

Petitioner:	Nora Dutka as Guardian of the Estate of T.M., a minor, and the Estate of J.M., a minor
Respondent:	AIG Life Insurance Co.

CORPORATE DISCLOSURE STATEMENT

Petitioner Nora Dutka is an individual who does not fall within the scope of Supreme Court Rule 29.6's disclosure statement.

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Petitioner Nora Dutka's Petition For A Writ Of Certiorari

Respondent AIG's Brief in Opposition

PETITION FOR REHEARING

Please Reason, prevail.

Petitioner Nora Dutka (Ms. Dutka) asserts there are points of fact and law that have been misrepresented to this Court causing it to deny her a Writ of Certiorari.

The statements believed by Ms. Dutka to have misled this Court occurred in Respondent AIG's (AIG) Brief in Opposition. AIG made statements to this court that are inaccurate, incomplete, challenged and unproven, and/or irrelevant. There was insufficient time, prior to this Court's consideration of her petition, for Ms. Dutka to address these statements. There is insufficient space here to address them all.

As the many cases cited in Ms. Dutka's Petition show, where there is no express discretion clause in an ERISA covered insurance plan, every other circuit, citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), applies *de novo* review to plan term interpretations and to factual determinations of the administrator. Only the Fifth Circuit, in requiring no such discretion clause and instead applying

automatic deferential review (arbitrary and capricious) to an administrator's factual determinations, is in conflict with the other Circuit Courts. The existence of this conflict has not been disputed. The opinions of the lower courts here, however, show that this adherence to a deferential review standard likely led them to decide this case contrary to their own stated reservations about the evidence.

Due to the constraints of this Petition for Rehearing, complaints will be limited to AIG's Brief in Opposition. Ms. Dutka has necessarily included references to the Record of the District Court in order to substantiate her statements. These citations will include an underlined docket entry number in the District Court Record and are available on PACER or can be provided upon request.

Ms. Dutka, as Guardian of the Estates of T.M., a minor and J.M. a minor, respectfully asks this court to consider the grounds of this Petition, rehear, and grant her Petition of Writ of Certiorari.

GROUNDS FOR REHEARING

I. AIG improperly asserts that a valid discretion clause exists.

AIG's argument's regarding the existence or not of a discretion clause are irrelevant for purposes of this appeal. The existence of a discretion clause is not at issue before this Court. What is at issue is whether, absent a discretion clause in an ERISA covered plan, factual determinations of an insurance administrator are to be reviewed by the courts de novo.

AIG's Response is peppered throughout with assertions that the Petition should be denied because there is a discretion clause in a "plan document." The existence of a discretion clause has been challenged and briefed in the lower courts but never decided. Pet. App. 1-16. AIG has had more than ample time to establish that a discretion clause applies but never did. Ms. Dutka has been consistent in her arguments that no discretion clause applies. AIG's assertion of a contested, unresolved issue as if fact in support of an argument is conduct calculated to lead to an incorrect result.

On pages 9-13 of its' Response, AIG continues making arguments as though an actual discretion clause had been shown to apply. This is incorrect. AIG even goes so far in foot note 2 on page 12 of its' Response to assert that the actual policy was not in the record. The policy is in the Court's record though. Docket No. 30-31 (*the Policy*); Docket 34, (*Master Application for Group Accident Insurance*), *Dutka v. AIG Life Insurance Company*, (S.D. Tex. July 14, 2008) (No.4:07-cv-04316). Expressly, these documents "make up the entire agreement between the parties." Docket No. 31, p.4, *Dutka* (No.4:07-cv-04316) (*integration clause in the policy*).

The first documents sent to Ms. Dutka, upon her request, from AIG were the actual policy and the Master Application for Group Accident Insurance listed above. The policy had a clause integrating these documents and the attached riders. *Id.* None of these documents contained a discretion clause. Docket No. 30-31, 34, *Dutka* (No.4:07-cv-04316). The document AIG proffers as containing a discretion clause showed up a year and a half later, after Ms. Dutka's Summary Judgment motion in District Court. It had not been referred to up to that point and was not written by AIG or any other insurer nor did it have dates regarding

enactment or effectiveness. Docket No. 39, *Dutka* (No.4:07-cv-04316). In a hearing before the District Court, Dutka directly challenged its applicability and whether it even existed at the relevant time and AIG NEVER offered any evidence of either. Docket No. 60, p.2, *Dutka* (No.4:07-cv-04316). The court never ruled on the issue.

In its Reasons for Denying the Petition, AIG asserts that this case is not ripe for this court's consideration. Br. in Opp. 6-14. In one brush stroke, "here the plan documents expressly grant discretionary authority to AIG to determine whether Ms. Dutka is eligible for the benefits she seeks," AIG attempts to make a legal argument and support it with a demonstrably unproven statement regarding the existence of a discretion clause. Br. in Opp. 6.

Though offering no legal authority for the assertion, AIG also argues that in order to decide this case, this Court would have to decide whether a discretion clause exists at all. Br. in Opp. 11. This is completely wrong. It is backward. This Court is simply being asked to determine if a discretion clause is required for a court to apply a deferential standard of review to factual determinations. Ms. Dutka did not ask this Court to decide if

a discretion clause exists. It is not an issue on appeal. The existence of a discretion clause would be a determination for the District court upon remand just as it is in an original proceeding.

Ms. Dutka's claim denial was affirmed precisely because the court gave deference to an administrator's determination *regardless* of the existence or not of a discretion clause. Pet. App. 3, 4, 13. Therefore, this case is precisely ripe for this court's consideration on the very narrow question presented.

II. AIG improperly asserts that the preponderance of the evidence supports the denial. The Fifth Circuit and the District Court indicate otherwise.

In addition to improperly arguing the existence of a discretion clause, AIG has made their Brief in Opposition little more than an attempt to retry the facts. The facts have not been appealed. AIG blatantly proffers that the "preponderance of the evidence" would cause the same result regardless of the standard of review applied. Br. in Opp. 13. But the lower courts indicated that the evidence offered by AIG, in fact, did not rise to the level of preponderance of the evidence. Pet. App. 4-5, 16. "We agree

with the district that there was no direct proof that the drugs caused this crash... Pet. App 6. But, in applying an arbitrary and capricious standard, the court affirmed the denial. *Id.*

It is disingenuous of AIG to assert that the court made any determination based on the veracity or weight of the evidence it offered. In its' Response, AIG quotes the district court judge as writing "the record in this case admits of no other decision." Br. in Opp. p.7. The lower courts made a decision based on Circuit case law granting deferential review regardless of a discretion clause in the policy. Pet. App. 3, 7(fn4), 13. The very reason Ms. Dutka has persevered in her claim is precisely because she asserts the case would not come out the same under *de novo* review. She finds support for her assertions in the lower courts opinions where they courts take pains to note they are making their ruling in spite of insufficiencies in the evidence. Pet. App 4, 5, 6, 15.

III. AIG has, throughout the case, and in its' Response, deliberately and systematically misquoted their own expert in order to turn a hypothetical statement into a usable fact.

Much of AIG's argument has rested on the statement of its' expert, a Ph.D. in toxicology. However, in its' Response, AIG manages to continue the case-long misquoting of their expert. They did so with such abandon in the lower court pleadings that the taint extends to the actual opinions of the lower courts. Their expert, Gary Lage, PhD, was indeed a paid master at derogatory prose, but he never said that he believed Mr. Macsai was under the influence at the time of the accident and he never said that he believed that drugs caused this accident. Docket No. 28, 32, 33, *Dutka* (No.4:07-cv-04316). This is what the policy exclusions AIG used to deny the claim require. Docket No. 31, p.2, *Dutka* (No.4:07-cv-04316). AIG constantly took Lage's hypothetical statements and edited them to accomplish its points.

AIG's expert threw in much prejudicial material but never said that he believed the decedent was under the influence or that it caused the accident. Docket No. 28, 32, 33, *Dutka* (No.4:07-cv-04316). That statement arose from AIG's leaving out the 'if' in their expert's statements, turning a hypothetical into an assertable fact. See Br. in Opp. p. 14,

but compare, Docket No. 33, p.2, *Dutka* (No.4:07-cv-04316). AIG's expert is quoted as concluding that ingestion of cocaine and Propoxyphene would have impaired [Decedent's] ability to operate an aircraft. Br. in Opp. 14. But AIG deliberately excludes the words that Lage uses to qualify that statement "[i]f (the decedent) had been naïve to the effects of Propoxyphene (Darvon, ed.) and/or if cocaine was actually present in his blood at the time of the accident..." Docket No. 33, p.2, *Dutka* (No.4:07-cv-04316)[1]. AIG intentionally left out the qualifying "if"s when they quoted Lage even though Lage himself was very careful in his statements.

The District was clear when it said [t]here is no proof that the drugs in the decedent's system (sic) were a cause of the fatal crash..." Pet. App 15. AIG argues that Petitioner did not controvert their expert. Ms. Dutka did indeed challenge AIG's expert prior to the law suit with statements from the very learned treatises cited by him. Docket No. 22, *Dutka* (No.4:07-cv-04316). AIG itself put these statements into the record. Docket No. 39, p. 37, *Dutka* (No.4:07-cv-04316).

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[1] Gary Lage, Ph.D. in his last of three statements, two of which were in response to Ms. Dutka's challenges.

Another example of AIG's creative editing is where they failed to correctly quote the Fifth Circuit where it wrote that Propoxyphene, "might have had effects more severe in someone who did not regularly take the medicine..." Pet. App. 12. Instead AIG wrote, citing to the above quote, "Dr. Lage concluded, again without contradiction, that the ingestion of cocaine and Propoxyphene would have impaired [decedent's] ability to operate the aircraft. *Id.* at 12." Br. in Opp. 14. AIG literally replaced "might" with "would." *Id.*

AIG apparently took no warning from the Fifth Circuit regarding the jumps in logic in AIG's pleadings. Pet. App. 5.

IV. Rather than address the legal arguments in Ms. Dutka's Petition, AIG, in it's Response, continues to exploit prejudicial terms.

Cocaine, pilot error, Toxicology report, Propoxyphene. These very words reproduced hundreds of times are incredibly prejudicial to anyone with normal sensibilities. Cocaine? None was detected in the blood of the decedent. Docket No. 27, *Dutka* (No.4:07-cv-04316). Pilot error? The District Court took

AIG's wording, but no official report ever used the lexiconic term "pilot error." Docket No. 35, 36, *Dutka* (No.4:07-cv-04316). Toxicology report? Never does any Official indicate that Mr. Macsai was under the influence nor does any Official ever state that they believed drugs a cause of this crash. Docket No. 24, 27, 35, 36, *Dutka* (No.4:07-cv-04316). AIG's own expert never said so either but was misquoted nearly every time he was quoted at all. (See Section III, this Petition for Rehearing). Propoxyphene? This is Darvon which is a mild analgesic narcotic and the decedent's blood contained an amount equal to half a normal, common dose. According to AIG's own expert, "that amount may not produce significant impairment in an individual tolerant to the medication, but would in someone not tolerant." Docket No. 33, p.2, *Dutka* (No.4:07-cv-04316).

These prejudicial words are bloody shirts. AIG has waved them so fervently, they have painted the entire room with falsehood. Br. in Opp. p. 2,3,4,5,6,7,13,14. Under an arbitrary and capricious standard of review as applied below, these prejudicial words carried the day. Under a *de novo* review, where the court would examine the veracity and weight of the evidence, Ms.

Dutka asserts they would no longer prevail. There is substantiation in the opinions of the lower courts for her assertion. Pet. App. 4, 5, 6, 15.

It is very telling that AIG has yet again filed a responsive pleading utilizing prejudice instead of sound legal arguments.

V. Other possible misimpressions caused by AIG's Response.

Ms. Dutka believes it possible that this Court understood, due to AIG's statement to the effect in its Brief in Opposition, that Ms. Dutka is asking the court for an advisory opinion. Br. in Opp. 1. This is incorrect. Ms. Dutka presented only one question, 27 words: "[w]hether, absent an express discretion clause in an ERISA governed insurance plan, the factual determinations of the administrator are subject to de novo review by the courts." This is as pointed and specific as possible. In every circuit but the Fifth, the answer would be a simple and clear "yes." *See* Pet. App. 7-18.

In the first sentence of its Brief in Opposition however, AIG states that we are asking "what standard of review courts must apply." This is a very, very different question

from the one actually posited by Ms. Dutka, requiring a completely different type of answer.

As to pages 10-13, they are nothing more than AIG taking one more bite at arguing as if a discretion clause had been proven to exist. These arguments should be disregarded in their entirety.

AIG would further have this Court believe that denying cert. is no big deal. Br. in Opp. 13. However, approximately 134 million Americans are covered by ERISA governed plans. *From the Colorado Dept. of Insurance website*: http://www.dora.state.co.us/INSURANCE/consumer/2009%20docs/consFaqERISA062209.pdf. The U.S. Census Bureau lists the population of the Fifth Circuit (Texas, Louisiana, and Mississippi) at over 10 percent of the United States population. *U.S. Census Bureau website*: http://factfinder.census.gov/home/saff/main.html?_lang=en. This case, therefore, presents the opportunity to affect the lives of over 13.4 million people by placing them on equal legal footing with the citizens of the other circuits. Even if, as AIG asserts (Br. in Opp. 13), only a small fraction are covered by plans with no

discretion clause, there are still potentially millions of people involved.

This case has drawn the attention of the Bar and the Courts of the Fifth Circuit such that it has already been cited three times, in Fifth Circuit opinions, just for the citations to prior case law within. [2]

If this Court's denial is allowed to stand, Ms. Dutka asserts that this case can also be accurately cited for the proposition that "all death determinations are strictly factual and thus reviewed under an arbitrary and capricious standard and we're not going to require discretion clauses or consider plan term interpretation arguments." This is indisputably and exactly what happened in this case. This is not only in conflict with every other Circuit Court, this directly contradicts what this Court said in *Bruch v. Firestone*. In 1989, this Court said, "a denial of benefits challenged under 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary

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[2] *Piecznski v. Dril-Quip, Inc. Long Term Disability Plan*, No. 09-20187 (U.S. Ct of App. 5th Circuit) November 23, 2009; *Graham v. Met. Life*, No. 09-60042 (U.S. Ct of App. 5th Circuit) October 22, 2009; *Holland v. International Paper Co. Retirement Plan*, 576 F.3d 240, 251 (5th Cir. 2009).

authority to determine eligibility for benefits or to construe terms of the plan." 489 U.S. 101, 115 (1989).

Finally, in her lower court pleading, Ms. Dutka argued that AIG's dual role as administrator and insurer created a conflict of interest which should have at least reduced the deference granted to the administrator. The District Court disregarded Ms. Dutka's arguments and made no allowances. Pet. App. 14. This Court, during the time of this case, later examined that very issue in another case and found that such an arrangement does indeed create a de facto conflict of interest. *Met. Life v. Glenn*, 128 S. Ct. 2343, 2351 (2008). That case also reaffirmed that absent an express discretion clause, review is *de novo*.

CONCLUSION

This case presents the Court with a ripe controversy involving a sole Circuit applying a law that conflicts with the other Circuit Courts. The result of that conflict is that Ms. Dutka has no chance at *de novo* judicial review of the facts of her case even though

she would in any other circuit in the United States.

Granting Ms. Dutka's petition, answering her question in the affirmative and remanding back to the District court is the proper decision. It would require the District Court to examine whether a discretion clause exists here. When, as Ms. Dutka asserts, one is not found to apply, the court would then be able to examine and rule on the weight and veracity of the evidence *de novo*. This squares with the law in the other circuits. *See* Pet. App. 7-18.

Before dismissing this Petition for Rehearing as the last gasp of a drowning Petitioner, this Court must recognize that Ms. Dutka's endurance and unwavering commitment to her position has allowed her to stay this course and present this Court with a ripe opportunity to remedy an egregious and destructive inconsistency between the Circuit Courts. And she has gone to great lengths to accurately and honestly plead her case. To let that be derailed by less worthy comportment would be the deepest cut of all.

Ms. Dutka prays this Court rehear her Petition for Writ of Certiorari and grant it.

Please reason, prevail.

Respectfully submitted,

/s/ J. Kevin Tarrant
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CERTIFICATE OF COUNSEL

As counsel for petitioner, I hereby certify that this Petition for Rehearing is presented in good faith, is limited to responses to arguments made in Respondent's Brief in Opposition, and is not offered for purposes of delay.

/s/ J. Kevin Tarrant
Counsel for Petitioner